In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER.

In their brief, respondents concede that the two cases chiefly relied upon by petitioner correctly state the law applicable to negligence cases involving two inconsistent theories, or a choice of probabilities. We refer to *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333 (1933) and to *Gedra v. Dallmer,* 153 O. S. 258 (1950). Respondents, at page 8 of their brief, point out that the Court of Appeals held in its opinion:

> "The jury could reasonably consider that the evidence disclosed a probability rather than a mere possibility that the accident was due to the negligent manufacture of the wheel by appellee company." (R. 335, 336.)

From this it is contended that since respondents' theory that the injury was caused by negligent manufacture has been established as a probability rather than a mere possibility, the rule of law in the *Chamberlain* and *Gedra* cases is not applicable to this case. That is a *non sequitur.*

Establishing respondents' theory as a probability does not in itself disprove petitioner's argument that the re-

spondents' own evidence shows a probability that the cause of injury was the application of excessive air pressure. It merely offers a choice of probabilities between two inconsistent theories.

Respondents take the false position that the opinion testimony offered at the trial to establish their claim of negligent manufacture, of necessity negatived their own evidence that the injury was caused by the application of excessive air pressure. Respondents' evidence did no more than offer the court a choice of probabilities. Their citations to the record do not sustain their claim that the evidence shows the injury was not caused by the application of excessive air pressure (respondents' brief, page 5). Nor do their citations to the record at page 7 of respondents' brief support their claim that the wheel was inflated with a pressure of not more than 30 pounds.

It is not denied that O'Donnell was using an air hose from an unrestricted source, having a pressure of 120 to 180 pounds. At page 3 of respondents' brief it is admitted that O'Donnell does not remember what happened after he last gauged the tire. An appreciable lapse of time went by while O'Donnell held the air hose, before the accident happened. The only reasonable deduction is that more air was applied to the tire, to the point that the wheel broke. The trial court found that it was more likely that the accident was caused by an application of excessive air pressure. We quote (R. 269):

> "* * * an examination of the rivets or ferrules and the nature of the distortion of the body of the disc and the holes through which the rivet ends were pulled, seems to me to evidence and support a finding that the application of excessive air pressure rather than failure due to defective manufacture caused the violent separation of the wheel assembly."

The best that can be said for respondents' contention is that the proven facts give equal support to each of two

inconsistent inferences. In that event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. See *Pennsylvania Railroad v. Chamberlain, supra.*

The Ohio rule as announced in *Gedra v. Dallmer, supra,* goes even further. That case holds that in a negligence action which might have resulted from one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible. Respondents offered no evidence to exclude the effectiveness of excessive air pressure as the cause of the injury. They only showed that the accident might have happened because of defective manufacture.

Respondents have not proven a case according to the standards set out in the *Chamberlain* and *Gedra* cases. The District Court ruled correctly in sustaining motion for judgment. The Court of Appeals misconceived the nature of this action. It decided this case in terms of inapplicable Federal Employers' Liability Act cases, rather than as one involving Ohio common law.

Petition for Writ of Certiorari should be granted.

Respectfully submitted,

James A. Butler,
Kenneth D. Carter,
Counsel for Petitioner.

March 27, 1951.

FILED
FEB 13 1951

In the Supreme Court of the United States

No. 550

OCTOBER TERM, 1950.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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STATEMENT OF THE QUESTION INVOLVED.

1. This appeal presents the single question whether the District Judge was right in his view that since he disbelieved plaintiffs-appellants' testimony, and had made his mind up that if plaintiffs-appellants had a verdict he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their testimony.

The District Court answered this question, "Yes."

The appellant contends that this question should be answered, "No."

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DOCKET NO. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Plaintiffs-Appellants,

VS.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE PLAINTIFFS-APPELLANTS.

STATEMENT OF FACTS.

This cause sounding in negligence came on for hearing on the plaintiffs-appellants' Amended Complaint for Personal Injury and defendant-appellee's Answer thereto, in the District Court of the United States within and for the Northern District of Ohio.

At the conclusion of the reception of all the evidence, defendant-appellee's motion for a directed verdict in favor of the defendant was sustained by the District Judge (T. 267, 268, 269). On May 28, 1949, plaintiffs-appellants filed a timely Motion for a New Trial, which was overruled by the District Court June 7, 1949.

On May 16, 1944, the appellant, Edward P. O'Donnell, was engaged in the performance of his regular duties as an employee of the Grand Central Service Station at Chicago, Illinois. Appellant had been employed there for

approximately one year, and during that time and in his regular course of employment, he had repaired three to four tires a day (T. 53), and had repaired 20 or 25 wheelbarrow tires during that time (T. 179). Appellant was an experienced man on this type of work (T. 61). On the above mentioned date, appellant had repaired a tube which was a part of a 4.00 x 8 wheelbarrow wheel assembly. Having inserted the repaired tube in the casing, and having mounted the tube and casing on the wheel, appellant began to inflate said tube. Appellant intended to inflate said tube with an air pressure of 48 pounds in accordance with the instructions given by Mr. Kurt Wittig, the owner of the wheel (T. 163). The tire was designed to carry a normal air pressure of 60 pounds (T. 231) and there is also a factor of safety of three times one built into the tire (T. 249), which would place the bursting point of said tire at approximately 180 pounds.

After once applying the air hose to the valve, appellant removed the air hose and applied a gauge which showed the air pressure to be 18 to 20 pounds (T. 162, 164, 181, 184). Appellant again applied the air hose and again gauged the air pressure, finding it to be 25 to 30 pounds (T. 163, 164, 181, 184). The appellant does not remember applying the air hose again (T. 163, 181) or anything else which happened subsequently. In a matter of seconds after he had gauged the pressure a second time, the wheel disintegrated, the two sections coming apart forcibly, one section of which struck appellant on the right hand and on and about the right portion of his face and head, seriously injuring him.

The wheel in question (Plaintiffs-Appellants' Exhibits 1 and 2) was manufactured by the appellee, Geneva Metal Wheel Company, and is known as their Model DC-285-P. Mr. Frank F. Branch, the chief engineer of the Geneva Metal Wheel Company from 1938 to 1948 (T. 26), who designed their Model DC-285-P (T. 26), could not deny that

plaintiffs-appellants' Exhibits 1 and 2 were manufactured by appellee (T 28). He testified that said exhibits were "similar" to Geneva's DC-285-P (T. 27); that Exhibits 1 and 2 "could have been made by the Geneva Metal Wheel Company" (T. 28), and that he could not point out any points of dissimilarity between Exhibits 1 and 2 and Geneva's Model DC-285-P (T. 40, 41). Furthermore, after having testified that similar wheels are manufactured by the Parish Stamping Company and by the Dico Company (T. 27), Mr. Branch, when confronted with plaintiffs-appellants' Exhibit 8 depicting a Dico wheelbarrow wheel, himself readily found two major points of dissimilarity in that the Dico wheel contained eight rivet holes instead of six, and in that the Dico wheel has no chain hole (T. 45).

Mr. Henry A. Carter, who has been employed by the appellee since 1916 (T. 12) and who has been president and treasurer since 1942 (T. 11), could not deny that plaintiffs-appellants' Exhibits 1 and 2 were manufactured by the Geneva Metal Wheel Company (T. 18, 25).

Two expert engineers, Norman J. Beno of Chicago and Bernard R. Krashin of Cleveland, testified in behalf of plaintiffs-appellants as to the cause of disintegration of the wheel in question. Norman J. Beno, the first of plaintiffs-appellants' engineers to take the stand, possesses both a Bachelor of Science degree in engineering and a Master of Science degree in physical chemistry from Marquette University, and has had a vast amount of experience in the field of metallurgy and the physics of air pressure, having spent 18 years in the testing laboratory of the Continental Can Company (T. 71, 72). Bernard R. Krashin, who also testified in behalf of the plaintiffs-appellants, possesses a Bachelor of Science degree in chemistry from Western Reserve University, and has for the past 8 years been assistant technical director of the Cosma Laboratories, whose chief work is that of testing metals for both private manufacturers and the armed services. Cosma Laboratories

has been sanctioned by the Army, Navy and Air Force as an approved testing laboratory for all metal substances used in the construction of materials of war (T. 46).

Both of plaintiffs-appellants' expert engineers unqualifiedly testified that *it was* possible to reconstruct and determine the condition of the ferrules and the wheel in question at the time of manufacture. Not only did they state that it was possible, they went further and stated that they had *in fact* determined the condition of the said ferrules and wheel in question at the time of manufacture (T. 89, 144, 145). It should be kept in mind that both engineers testified that they had made the necessary examinations and tests of the ferrules and wheel and arrived at their conclusions independently of each other (T. 141). Both of plaintiffs-appellants' engineers testified that the disintegration of the wheel in question, which caused the injury complained of, was due to defects in the ferrules existing at the time of manufacture (T. 75, 87, 156), and not to the application of excessive air pressure to the pneumatic tire and tube mounted on the wheel.

Said defects were in the ferrules which held the two halves of the wheel together. Five of the six ferrules had radial cracks in the rolled over edge of the ferrule (T. 139), which cracks would have the effect of materially weakening the ferrules (T. 77, 142, 149). The rolled over edge of the ferrules also had a thinned out section where they had been rolled to a point, which further weakened the ferrules (T. 142). Both of these conditions occurred at the time of manufacture (T. 144, 145). The radial cracks could have been seen at the time of manufacture (T. 153), and could have existed only before the disintegration (T. 153), because at the time of disintegration, the rolled over edge was drawn through the rivet hole in the disk, which action would tend to close the radial cracks (T. 83, 92) rather than open them. These ferrules also contained circular cracks which would tend to further weaken the strength of these ferrules (T. 77, 147, 148, 149).

The expert testimony also revealed that in the light of the above defects in the ferrule rivets, which undoubtedly occurred at the time of manufacture, the wheel could have failed at an air pressure of only 40 pounds (T. 87).

There was no evidence that the wheel or ferrules, while in use, had been abused or mistreated in any way (T. 90, 144, 146).

To meet the evidence given by plaintiffs-appellants' expert engineers, defendant-appellee called on Frank F. Branch who designed the wheel for defendant-appellee. Mr. Branch has no degree of any kind, his formal training consisting of high school, one year of mechanical engineering at the University of Chicago, a night course in drafting and strength of materials at Case Institute of Technology, and a course from the International Correspondence School. Since that time, he has occupied the position of master mechanic in defendant-appellee's employ and subsequently rose to the position of chief engineer (T. 38). Throughout the whole of his testimony, Mr. Branch was unable to show that *this* wheel had been subjected to tests for defects before it was placed on the market. In fact, the major portion of his testimony was concerned with statements of a *general* nature purporting to show the *general* process of manufacture and that the care taken at all times in such manufacturing process was the best that was in general use in the manufacture of wheels. He stated that 35 pounds of air pressure was put in each tire mounted on a wheel before it was shipped (T. 37), despite the fact that the wheel was designed by him to withstand a maximum air pressure of 120 pounds (T. 27). Some wheels which were shipped by defendant-appellee were shipped without tires, and those were not given a pressure test at all (T. 34). Approximately one wheel out of each one thousand manufactured was given a hydrostatic pressure test to a pressure of at least 125 pounds (T. 37, 38).

In rebuttal of plaintiffs-appellants' evidence that the radial cracks in the ferrule rivets were caused in the manufacturing process before the wheel left defendant-appellee's factory, Mr. Branch testified that radial cracks could be caused by the application of excessive air pressure in the tire (T. 246), but he also stated that he had never seen any cracks develop even at an air pressure of 125 pounds (T. 246). There is abundant evidence in the record to show that on the occasion of this accident, the wheel involved was inflated with a pressure of not more than 30 pounds (T. 163, 164, 181, 184).

It should be noted that all three of the above mentioned engineers, including Mr. Branch, stated that if the ferrules were defective, the wheel would be "inherently dangerous" (T. 99, 146, 245).

ARGUMENT.

1. This appeal presents the single question whether the District Judge was right in his view, that since he disbelieved plaintiffs-appellants' testimony, and had made his mind up that if plaintiffs-appellants had a verdict he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their testimony.

The District Court answered this question, "Yes."

The appellant contends that this question should be answered, "No."

The case at bar raises a question of negligence in the manufacturing, placing on the market, selling and distributing of an "inherently dangerous" article. One who manufactures, puts upon the market, sells or distributes a product, has an obligation to make that product in such a way that it will serve the purpose for which it is intended and also the further obligation to make the product so that it

will not injure prospective users when used for the purpose intended.

The liability or nonliability of the supplier of chattels to a person other than the one immediately supplied—as, for example, that of a manufacturer or distributor of goods passing through one or more middlemen to the user—has posed a difficult problem for the courts in the past. The most perplexing hurdle faced by the courts was the lack of privity of contract. One of the earliest cases dealing with this problem was decided in 1842 by the Court of Exchequer, *Winterbottom v. Wright,* 10 M. W. 109, 11 L. J. Ex. 415. In that case the court was confronted with a contract under the terms of which the defendant agreed to keep a mail coach in repair after it was sold. The plaintiff, who was not a party to the contract, was injured by reason of a defect in the coach. It was held that no action *on the contract itself* could be maintained by a plaintiff not a party to the contract. However, the holding was universally misinterpreted, and the dicta therein were taken to mean that there could be no action *even in tort,* even though the chattel was defective when delivered. Arising out of the misinterpretation of such dicta, there developed a general rule which prevailed until recent years that the supplier of goods was not liable for damages caused by dangers or defects therein to anyone but his immediate buyer. *Hasbrouch v. Armour and Co.,* 1909, 139 Wis. 347, 121 N. W. 157; *Lebourdais v. Vitrefied Wheel Co.,* 1907, 194 Mass. 341, 80 N. E. 482; *Burkett v. Studebaker Bros. Mfg. Co.,* 1912, 126 Tenn. 467, 150 S. W. 421; *Liggett and Myers Tobacco Co. v. Cannon,* 1915, 132 Tenn. 419, 178 S. W. 1909. Several reasons were given in support of this rule. (See *Huset v. J. I. Case Threshing Machine Co.,* 8 Cir. 1903, 120 F. 865, and cases there cited.) One such reason was that the seller's misconduct was not the cause of the damage to the consumer in a legal sense, because no harm was to be anticipated by the supplier from

any defects in the goods, and that the intervening resale by one in the line of distribution "insulated" any negligence on the part of the supplier. The courts generally have long since discarded this argument, holding that if goods are sold to a dealer, nothing is more foreseeable than that they will be resold, perhaps again and again, until they reach the consumer [see *Meshbesher v. Channellene Oil and Mfg. Co.*, 1909, 107 Minn. 104, 119 N. W. 428; *Flies v. Fox Bros. Buick Co.*, 1928, 196 Wis. 196, 218 N. W. 855; *Farley v. Edward E. Tower and Co.*, 1930, 271 Mass. 230, 171 N. E. 639], and that if such goods are dangerous, he will be injured by them. (See *Mossrud v. Lee*, 1916, 163 Wis. 229, 257 N. W. 758; *Burk v. Creamery Package Mfg. Co.*, 1905, 126 Iowa 730, 102 N. W. 793.) Thus it can be seen that these cases fall well within the limits of legal causation. The courts have constantly whittled away at this general rule of nonliability, both in England [*Donoghue v. Stevenson*, 1932, A. C. 562, 101 L. J. P. C. 119; *Grant v. Australian Knitting Mills*, 1936, A. C. 85, 105 L. J. P. C. 6], and in the United States [*Huset v. J. I. Case Threshing Machine Co.*, 8 Cir. 1903, 120 F. 865; *Weiser v. Holzman*, 33 Wash. 87, 73 P. 799; *Farley v. Edward E. Tower Co.*, 1930, 271 Mass. 230, 171 N. E. 639], by developing several so-called "exceptions" to the supposed holding of *Winterbottom v. Wright*, 10 M. W. 109, 11 L. J. Ex. 415. The most important and one of the earliest of these "exceptions" was that a supplier is liable to a third person for negligence in the preparation or sale of an article "inherently dangerous" to human safety, or, as it was held in the leading federal case of *Huset v. J. I. Case Threshing Machine Co.*, 8 Cir. 1903, 120 F. 865, an article "intended to preserve or affect human life."

Finally, in 1916 the problem fell into the able hands of Judge Cardozo in the now celebrated case of *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. The question presented in that case was the liability or nonliability

of a supplier of an automobile with a defective wheel bought from the dealer by an ultimate purchaser who was injured by its collapse. The *supplier* was held liable for negligence. The fundamental rule laid down by Judge Cardozo was clearly that a manufacturer or supplier, by placing an article on the market, assumed a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase and the foreseeability of harm if proper care were not used. The first paragraph of the syllabus in that case reads as follows:

> "If the nature of a finished product placed on the market by a manufacturer to be used without inspection by his customers is such that it is reasonably certain to place life and limb in peril if the product is negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. This principle is not limited to poisons, explosives and things of like nature, which in their normal operation are implements of destruction."

In the opinion, at page 390, it is said:

> "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of obligation where it ought to be. We have put its source in the law."

Thus it can be seen that the holding in the *McPherson* case sets forth the rule that the law imposes an obligation upon manufacturers, suppliers and distributors of chattels to make a product in such a way that it will serve the purpose for which it is intended, and also the obligation of not having or including in the product anything that will injure prospective users when used for the purpose intended.

The majority of courts in the United States, including this Honorable Court, have abrogated the old general rule of "nonliability" of manufacturers and suppliers of chattels and have adopted the rule of *liability of manufacturers* as is evidenced by their approval of the rule of *McPherson v. Buick, supra.* See *Goullon v. Ford Motor Company,* 6 Cir. 44 F. 2d 310; *Barrett v. Bobal,* 6 Cir. 74 F. 2d 406; *Johnson v. Cadillac Motor Car Co.,* 2 Cir. 261 F. 878; *Reed and Barton Corporation v. Maas,* 1 Cir. 73 F. 2d 359; *Egan Chevrolet Co. v. Bruner,* 8 Cir. 102 F. 2d 373; *Liggett & Myers Tobacco Co., v. DeLape,* 9 Cir. 109 F. 2d 598; *General Accident Fire and Life Assurance Corp., Ltd. v. Goodyear Tire and Rubber Co.,* 2 Cir. 132 F. 2d 122; *General Motors Corp. v. Johnson,* 4 Cir. 137 F. 2d 320; *Sieracki v. Seas Shipping Co., Inc.,* 3 Cir. 149 F. 2d 98.

A very good statement of this changeover is contained in the case of *Carter v. Yardley and Company,* 1946, 319 Mass. 92, 64 N. E. 2d 693, wherein it is said:

> "The doctrine of the McPherson case is now generally accepted. Am. Law Inst. Restatement; Torts, ss 394-402; Harper, Torts (1933) § 106; Prosser, Torts (1941) 206-210, 673-688; Winfield, Torts (1937) 430, 566-569, 572, 579; Seavey, 52 Harv. L. Rev. 376-379; Jeanblanc, 24 Va. L. Rev. 134; Feezer, 37 Mich. L. Rev. 1. Its acceptance has brought all dangerous things into the same class as the 'inherently dangerous' things to which the principle already stated has always been applied. The McPherson case caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be part of the law. * * *
>
> "In many recent cases that asserted general rule of nonliability to persons not in privity of contract has been denied, either in terms or in effect, and the principle stated earlier in this opinion has been applied. * * *

> "The time has come for us to recognize that that asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."

Thus the law is clear that the manufacturer of an article for sale to the public owes a duty beyond the mere contract itself and that this duty is to refrain from including in the article sold any hidden danger unknown to the buyer. The seller's failure to conform to this duty gives rise to a cause of action for negligence.

In the case at bar, defendant-appellee failed to conform to this duty in that defendant-appellee manufactured and placed upon the market a defectively constructed wheel, which, when used for the purpose and in the manner intended, disintegrated and caused serious injury to plaintiff-appellant Edward P. O'Donnell. The wheel was defectively constructed in that five of the six ferrules which held the two halves of the wheel together had radial cracks in the rolled over edge (T. 139), which caused said ferrules to be weak (T. 77, 142, 149). The ferrules also had a thinned out section where they had been rolled to a point which further weakened the ferrules (T. 142). These defects did occur at the time of manufacture (T. 144, 145) and could have been seen if the wheel had been properly inspected (T. 153). These ferrules also contained circular cracks which would tend to further weaken their strength (T. 77, 147, 148, 149). As the result of these defects, the wheel itself was weakened to such an extent that the wheel could have failed at an air pressure of approximately 40 pounds (T. 87), even though the wheel had been designed to withstand a maximum air pressure of 120 pounds (T. 27). There was absolutely no evidence offered to show that the wheel or the ferrule rivets had been abused or mistreated in any way after the wheel left the factory (T. 90, 144, 146).

Thus there is abundant evidence in the record to show that defendant-appellee manufactured and placed upon the market a wheel which, by reason of defective construction, was dangerous to prospective users when used for the purpose and in the manner intended. It is obvious that plaintiffs-appellants did present substantial evidence of an affirmative nature to show that the wheel was defectively constructed. Defendant-appellee was unable to offer proof to the contrary, but merely presented evidence to show that each part when being made is *usually* inspected for defects. However, this is only evidence of a *general* method of working and in no event does it show that this particular wheel was properly made and inspected. Such evidence purporting to show that *general* processes of manufacture are adequate and proper is not sufficient to discharge a manufacturer's duty to make a product properly. See *Liggett & Myers Tobacco Company v. DeLape, supra,* wherein a manufacturer was held liable for a defectively manufactured cigarette. The court says, at pages 600, 601:

> "In such cases the manufacturer has gone to great lengths to show by evidence that he has taken the legal degree of care in general in the processes used. The courts have not been satisfied with this answer."

Therefore, in light of the above facts and evidence, plaintiffs-appellants contend that they offered substantial evidence of an affirmative nature to sustain their cause, particularly in view of the fact that plaintiffs-appellants are entitled to every inference of negligence arising therefrom when the trial court contemplates a directed verdict.

It is plaintiffs-appellants' contention that the District Court, in failing to permit the jury to pass upon the credibility of plaintiffs-appellants' witnesses and the weight of plaintiffs-appellants' evidence, invaded the province of the jury and in so doing, deprived plaintiffs-appellants of their right to a trial by a jury of their peers, as guaranteed by the Seventh Amendment of the Constitution of the United States.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166; *Bailey v. Central Vermont Ry.,* 319 U. S. 350, 63 S. Ct. 1062.

That the District Court did in fact pass upon the credibility of plaintiffs-appellants' witnesses and the weight of plaintiffs-appellants' evidence is manifestly apparent when the following statements from the Court's "Opinion on Defendant's Motions at the Close of Plaintiffs' Evidence and Renewed at the Close of All Evidence" are considered:

"While I do not question the integrity of the metallurgists, I am sorry but I cannot say that their opinions as to the character of the ferrules at the time of manufacture, based solely upon their examination of the ruptured ferrules now, or shortly after the event in the case of one of them, *outweighs* the defendant's evidence as to the methods of manufacture, the tests and inspections given by their own employees during manufacture, as well as those tests given by the companies who furnished pneumatic tires." (Emphasis supplied.)

"In other words, the testimony, or rather the opinion evidence, of the experts is not of the reliable character or *weight,* in my opinion, to justify a submission of the case against what I conclude is the *greater weight* of the evidence that the wheel was adequate for the normal uses for which it was intended and manufactured." (Emphasis supplied.)

"The net result of this reaction to the whole evidence is that it is much more likely that the rupture of the wheel was caused by excessive air pressure from an unrestricted source than that it was caused by a defect in the wheel assembly, particularly in the ferrules, which, in the exercise of due care in manufacture, tests and

inspections, could or should have been foreseen or known by the defendant.

"The *evidence of the experts* on what probably happened in manufacture, based solely upon examination of the metal after violent rupture seems speculative to me *as compared with* the practical and, as I think, *persuasive testimony of Branch* as to the method of manufacture, required specifications, tests and inspections to which defendant's wheels were subjected." (Emphasis supplied.)

Having carefully considered the above statements uttered by the District Court, the plaintiffs-appellants are left with no alternative other than to believe that the Court did not fully believe plaintiffs-appellants' expert witnesses and further that the Court weighed plaintiffs-appellants' testimony against that of the defendant-appellee to arrive at its decision.

The reported cases are replete with judicial opinions holding that it is within the jury's province to pass upon the credibility of witnesses and the weight of the evidence, and that it is error for the trial judge under our system of jurisprudence to usurp those functions where there is substantial evidence to go to prove plaintiffs-appellants' case. Certainly, it cannot be said that there is no more than a mere scintilla of evidence to support plaintiffs-appellants' position in the case at bar.

In the case of *Howard v. Louisiana and A. Ry. Co.*, 5 Cir., 49 F. 2d 571, the trial court was confronted with much the same situation as that in the instant case. At pages 573, 574 of the opinion the court clearly and concisely sets forth the functions of the trial judge and his relation to the jury under our system of federal jurisprudence:

"Defendant's contention confuses and seeks to blend two powers and functions possessed by a district judge presiding over a jury trial each, entirely separate and distinct from the other: The power primarily to instruct a verdict for want of evidence recognized in *Barney v. Schmeider,* 9 Wall. 248, 251, 19 L. Ed. 648,

'It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, or any competent evidence, the jury finds for the defendant for that very reason. And in such case it is strictly correct, if the plaintiff does not take a non-suit, for the court to instruct the jury to find for the defendant,' and the power always recognized as resident at common law in the trial judge to set a verdict aside when in the opinion of the judge it is not right that the verdict should stand: 'Its (the Seventh Amendment) aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.' *Walker v. New Mexico R. Co.*, 165 U. S. 593, 17 S. Ct. 421, 422, 41 L. Ed. 837.

"The preservation of this right requires that the two functions of the trial judge, in the exercise of which he asserts his rightful powers of control over the results of jury trials, be never confused.

"Two great cases, *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873, and *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 532, 57 L. Ed. 879, in which the scope and meaning of the right of trial by jury guaranteed by the Seventh Amendment are authoritatively examined and fixed, make clear the essential separateness of these two functions: ' "Trial by Jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. This proposition has been so generally ad-

mitted, and so seldom contested, that there has been little occasion for its distinct assertion.' *Capital Traction Co. v. Hof,* 174 U. S. page 13, 19 S. Ct. 580, 585, 43 L. Ed. 873.

"In the *Slocum* case it was declared that in no instance may the judge find the facts for the jury, and that while he may set the verdict aside, if he does so, another trial by jury must follow. In that case the court said: 'It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact.'

"To permit a trial judge to do what defendant contends he may do, instruct a verdict for one party where there is evidence in support of the theory of the other, merely because the judge does not believe the evidence to be true, is in effect to permit him to submit the case to the jury, and the verdict having come in contrary to the judge's views, to render a verdict *non obstante veredicto,* thus recognizing his right to do indirectly that which he cannot directly do.' *Slocum v. New York Life Ins. Co.,* 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879.

* * * * *

"'*Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury.* * * * Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury.' *Richmond & Danville R. Co. v. Powers,* 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642.

"It is one thing for the trial judge in the exercise of his discretion after a verdict has come in to set that ver-

dict aside, even though there is evidence which if believed would support it, where in his opinion justice has not been done. It is quite another thing for the judge to refuse to permit the case to go to the jury where there is evidence which, if believed, would support a verdict for plaintiff, because, as stated by the trial judge in this case, he had reached the conclusion that if a substantial verdict should be rendered for the plaintiff he would be compelled to set it aside as against the law and the evidence.

"In the first place, it is a quite usual experience with trial judges that the fact that twelve average men have agreed to give credence to evidence which has not impressed the judge invests that evidence with a substance of credibility which it had not theretofore had, and if the judge, notwithstanding such verdict, still feels that justice has not been done, he has a more authoritative guide to the correctness of his conclusion than he had before the verdict came in. But these considerations entirely aside, it is the law that the trial judge has no right, merely because he does not believe the evidence of a party, to refuse to take the jury's verdict on it.

"In view of the course which the trial took below, it will serve no useful purpose to abstract the testimony. It is sufficient to say that the evidence overwhelmingly made a case of fault on the part of someone, and that without such fault the accident could not have occurred. Upon plaintiff's testimony the fault was the defendant's, and for the injury resulting it was responsible to plaintiff therefor. Upon the testimony of defendant the fault was plaintiff's, and defendant was without responsibility. Upon the matter of injury upon the testimony of plaintiff and his witnesses plaintiff received substantial injury; upon the testimony of defendant and its witnesses he did not.

"This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such

prerogative.' *Walker v. New Mexico R. Co., supra.*" (Emphasis supplied.)

Again, in the case of *Reid v. Maryland Casualty Co.*, 5 Cir., 63 F. 2d 10, the same court reiterates its stand on the lack of power in the trial judge to determine the credibility of witnesses or the weight of the evidence. At pages 11, 12 of the opinion it is said:

"This appeal presents the single question whether the District Judge was right in his view, that since he disbelieved plaintiff's testimony, and had made his mind up that if plaintiff had a verdict he would not let it stand, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses.

"We think it beyond question that he was not. *District Judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony.* They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution. Its purpose and aim 'is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.' *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 17 S. Ct. 421, 422, 41 L. Ed. 837. It requires that except in cases where the evidence is such that reasonable minds can draw only one conclusion from it upon the issues, cases tried to a jury must go to a jury for their verdict. Especially is this so where, as here, the case turns upon the credibility of the witnesses.

"Appellee cites our case, *Long v. American Ry. Express Co.*, 30 F. 2d 571, as supporting the action of the District Judge. It does not do so. It correctly though briefly states the rule quoted in *Barrett v. Virginian Ry. Co.*, 250 U. S. 476, 39 S. Ct. 540, 63 L. Ed. 1092,

from *Bowditch v. Boston,* 101 U. S. 16, 25 L. Ed. 980, which it cites. This rule authorizes a District Judge to instruct a verdict for one party where the other party would not, under the view of the evidence most favorable to him, be entitled to a verdict. *It does not give the District Judge warrant to pass upon the credibility of the witnesses or the weight of their testimony.*

"*Patton v. T. & P. R. Co.,* 179 U. S. 659, 21 S. Ct. 275, 45 L. Ed. 361, sustaining the action of the District Judge in instructing a verdict for want of evidence to support an inference of negligence, makes a clear and fine statement of the considerations which should guide a judge in determining whether he should instruct a verdict. *It declares that he should do so only when there is no excuse for a verdict save in favor of one party.*" (Emphasis supplied.)

The Court of Appeals for the Sixth Circuit guards the functions of the jury even more jealously than the majority of other courts. In *Scott et al. v. United States,* 6 Cir., 161 F. 2d 1009, decided less than two years ago, the court in opinion at page 1012, states very forcefully as follows:

"More than 25 years ago, this court said, in *Begert v. Payne,* 6 Cir., 274 F. 784, 787, 788: 'It is a commonplace that, upon a motion by a defendant for instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. The credibility of witnesses is peculiarly for the jury. * * * *A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion, to set the verdict aside. The test is whether there is such an utter absence of substantial evidence as to make it his duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the court may think the con-*

flict in testimony to preponderate in favor of defendant.' This court has steadily adhered to the doctrine. *Line v. Erie R. Co.*, 6 Cir., 62 F. 2d 657, 659; *Grand Trunk Western R. Co. v. Collins*, 6 Cir., 65 F. 2d 875, 876; *Grand Trunk Western R. Co. v. Heatlie*, 6 Cir., 48 F. 2d 759, 761; *Minneapolis, St. P. & S. S. M. R. Co. v. Galvin*, 6 Cir., 54 F. 2d 202, 203; Cf. *Gajda v. Reich-McJunkin Dairy Co.*, 6 Cir., 18 F. 2d 279, 280; *United S. S. Co. v. Barber*, 6 Cir., 4 F. 2d 625.

"The trial judge manifested a misconception of his function when, during the argument on the motion for a directed verdict, he said: 'In the Federal Court, the Court can direct a verdict on the preponderance of the evidence if the Court would not permit a verdict to stand on motion for new trial.' " (Emphasis supplied.)

It is plaintiffs-appellants' contention that the test applied by the District Judge herein did not conform to the test laid down in *Scott et al. v. United States, supra.* This is particularly true in view of the language of the Court herein, saying:

"Feeling as I do now that a verdict, if for the plaintiff, would have to be set aside because not supported by the greater weight of substantial and credible evidence, it is my conception of the court's duty in such circumstances to direct a verdict for the defendant, and it is so ordered."

The plaintiffs-appellants feel that there was sufficient substantial evidence of a probative nature contained in the presentation of plaintiffs-appellants' case so that the jury should have been permitted to consider and pass upon the credibility and weight of plaintiffs-appellants' witnesses and testimony. In summary, Mr. Beno and Mr. Krashin testified that, on the basis of their examination of, and tests on, the wheel and ferrules, which examination and tests were made within one month after the accident in the case of Mr. Beno, it was the defects in the ferrules at the time of manufacture which was the proximate cause of the rupturing of the wheel and not excessive air pressure.

Plaintiff contends that the credibility of the witnesses and the weight to be attached to their testimony should have been determined by the jury.

RELIEF.

It is, therefore, respectfully urged that this Honorable Court set aside the judgment in the above cause and remand this case to the District Court for a new trial.

Respectfully submitted,

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